UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ACUITAS CAPITAL, LLC,

Plaintiff,

v. 23-CV-2124 (PAE)

IDEANOMICS,

Conference

Defendant.

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New York, N.Y.
March 31, 2023
3:00 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

MCDERMOTT WILL & EMERY, LLP
Attorneys for Plaintiff
BY: ANDREW KRATENSTEIN
LISA GERSON

LAW OFFICES OF BARRY BORDETSKY
Attorney for Defendant
BY: BARRY BORDETSKY

ALSO PRESENT: HILARY UDOW
GABRIELLE LIPSITZ
MICHAEL WACHS

(Case called)

MR. KRATENSTEIN: Good afternoon, your Honor.

Andrew Kratenstein of McDermott Will & Emery. With me is Lisa Gerson, also from McDermott Will & Emery, for the plaintiff, Acuitas Capital.

THE COURT: Very good. Good afternoon to you.

MR. BORDETSKY: Good afternoon, your Honor.

Barry Bordetsky, from the Law Office of Barry Bordetsky, for the defendant, Ideanomics.

THE COURT: All right. Very good. Good afternoon to you as well.

And good afternoon to the others in the audience.

May I ask who they are?

MR. KRATENSTEIN: Yes. With me are two associates from our firm, Hilary Udow and Gabrielle Lipsitz; and Michael Wachs, who submitted a declaration. He's a consultant to Acuitas Capital.

THE COURT: Very good. Welcome. I'm glad you're here. Thank you.

You may all be seated.

First all, let me thank counsel. I'm mindful that this has crept up on everybody all of a sudden, and I am grateful to all of you for the excellent legal work all around. Specifically, I'm looking at the younger people on your team. So thank you, everybody, for all the work that's gone into

litigating both sides of the controversy.

I think I've got a pretty good sense of things and I think this hearing is best organized by my putting questions to each side, rather than having a freestanding argument.

So let me begin with you, Mr. Kratenstein.

MR. KRATENSTEIN: Kratenstein.

THE COURT: Kratenstein.

MR. KRATENSTEIN: Thank you.

THE COURT: The only arguments that you have been presented, as I understand from Ideanomics as to why the conversion is not something that you're entitled to as a matter of contract are twofold: one is the insider trading indictment; and the other is the notion that Acuitas is an unregistered dealer.

Those are the two arguments that had been offered, correct?

MR. KRATENSTEIN: Correct.

THE COURT: Nothing else?

MR. KRATENSTEIN: Correct.

THE COURT: Give me a minute or two or a minute just on the insider trading indictment. This is your CEO, your client's CEO?

MR. KRATENSTEIN: Correct.

THE COURT: And does it have anything to do with Ideanomics?

MR. KRATENSTEIN: No.

THE COURT: What is he alleged to have insider traded in?

MR. KRATENSTEIN: He is alleged to have insider traded in a stock called Ontrak where he was, I believe, on the board of that company and violated the policies about when he could dispose, allegedly, of that stock.

THE COURT: I see. And what's the status of that allegation?

MR. KRATENSTEIN: The indictment was just unsealed. I don't even know if he's been arraigned yet, but I do know that he intends to plead not guilty and fight the charges.

THE COURT: What court is that in?

MR. KRATENSTEIN: California, Central District, I believe.

THE COURT: Okay. And I take it that Acuitas is not implicated there. In other words, for better or worse, it's the CEO in a separate capacity in his officer or trustee or director responsibility role with respect to that other concern?

MR. KRATENSTEIN: Correct.

THE COURT: Is there any allegation that Acuitas's money is in some way implicated in the insider trading allegation?

MR. KRATENSTEIN: By Acuitas, do you mean Ideanomics?

THE COURT: Well, I mean really either.

MR. KRATENSTEIN: The allegations --

THE COURT: I mean it's Acuitas's CEO, right, who is the insider trader-defendant?

MR. KRATENSTEIN: Correct. So there's a different entity called Acuitas Group Holdings, which is the parent company of Acuitas Capital, the plaintiff in this case.

THE COURT: Right.

MR. KRATENSTEIN: There was no allegation and Acuitas Capital is not a party to either the DOJ or SEC actions in California.

THE COURT: All right. Now, let's just assume, just indulging pure hypothetical, that the indictment had named the Acuitas entity that's the party here. Same result?

MR. KRATENSTEIN: Same result in the case?

THE COURT: No. In other words, let's just assume that it was actually -- the indicted entity actually was a party to this case, that Acuitas Capital was a charged but only indicted defendant in that case. Would that have made any difference?

MR. KRATENSTEIN: No. I don't think it makes any difference here whatsoever.

THE COURT: Is there anything in the SPA that precludes somebody who has a pending criminal charge from conversion rights?

MR. KRATENSTEIN: No. In fact, quite the opposite. There is something in the SPA that says any unlawful conduct by anybody does not excuse the defendant from performing their obligations.

THE COURT: Okay. What about the second argument, which is the unregistered dealer? Supposing they were an unregistered dealer, whatever that is, would that bar them from conversion rights?

MR. KRATENSTEIN: No. As your Honor, I'm sure, knows from having reviewed the case law, there are at least a half dozen cases where courts in this district have held quite the contrary because the contract does not, on its face, require a conversion or sale of stock. Thus, it is not -- even if you assumed that the plaintiff in those cases was a dealer, that would still not be a violation of Section 29(b).

THE COURT: Is Acuitas, LLC a dealer?

MR. KRATENSTEIN: No. We contend that Acuitas Capital, LLC is not a dealer for several reasons. They are an investor, but they're not a dealer.

First of all, if that were true, then every plaintiff in the cases that I was just talking about presumably would be a dealer. But, yes, they invest in companies. They also take risks. When you think of a dealer, and what the cases talk about, and obviously there are several factors, but the cases talk about things like the dealer and the entity is really not

taking any risks. It's just making money on other people's transactions.

THE COURT: Like a market maker?

MR. KRATENSTEIN: Yes. That's not what's happening here. This is an investment that was made by a company and they hope -- yes, of course, they hope to make a return on that investment. Does not make them a dealer. But, of course, even if they were, that would be sufficient.

THE COURT: The context in which these allegations were made appears to bespeak some desperation on Ideanomics's part. And I need your help a little bit in understanding it. Why is it that Ideanomics, from your perspective, simply doesn't want to convert to Acuitas? Let me put it this way: Ideanomics has already gotten the $20 million or whatever from Acuitas. Acuitas wants to exercise the right that it bought in exchange, in effect, for giving the $20 million. What skin off of Ideanomics's nose is it? Why is it that, given the economic shape it's in, somehow or other converting matters?

MR. KRATENSTEIN: The best I can do to answer your question, the question, your Honor, is to convey what I understand was conveyed actually to Mr. Wachs, who is sitting here, what we put in our papers, which is that it would -- if the company honored its obligations to Acuitas Capital, that would make it more difficult for Ideanomics to get the financing it so badly needs because it's issuing stock, and

that stock could be sold at the depressed stock price. I assume that that's what they're getting at, but I don't know for sure.

THE COURT: But I was trying to figure it out. In other words, I thought, you know, one scenario would be that there's some legal or other cap on the number of shares that could be issued, and, in effect, if Ideanomics vacuums up a large number of them, and it would be a very large number given how watered down the stock price is, maybe there would be less to be issued to a future investor.

MR. KRATENSTEIN: That's exactly right. I think you meant Acuitas Capital. Yes.

THE COURT: Sorry.

MR. KRATENSTEIN: But if Acuitas Capital got all the stock -- and we also noted this in our papers -- if you're going to raise capital, obviously a form of compensation for that is stock. There's only so much registered stock. So there's a new risk that's actually disclosed in the 10-K that they may have to go and get more stock registered if they want to raise more money from others. And so, yes, that is, I presume, one of the reasons also that they don't want to issue their --

THE COURT: But that one leapt off the page as a plausible reason why they would be reluctant to issue what would be many, many shares to Acuitas --

MR. KRATENSTEIN: Yes.

THE COURT: -- but I'm not sure I understand your first point as to why this would matter. In other words, if I am a separate investor, putting aside any cap, I still know that Acuitas has this right to convert. As long as that hasn't been disclosed to the other investor, why is it that Acuitas's right, whether exercised or latent, is likely to deter another investor from investing?

MR. KRATENSTEIN: Yes. And I think there's also the Standby Equity Purchase Agreement that's important, which they already had in place. But remember, the Standby Equity Purchase Agreement, under the deal with Acuitas Capital, there was the lock-up. So they needed the cash. They couldn't utilize -- if you still follow our agreement, they couldn't utilize that cash for 90 days. They closed on the deal for Via, and all of a sudden, they need all of this cash, right? They need now $260 million more a year than they needed, plus have short-term cash needs. So they're bleeding cash. They need more cash. They have this Standby Equity Purchase Agreement where they can sell stock to YA in exchange for cash, but they can't use it. Now, all of a sudden, they need to use it.

And so we also believe that one of the reasons they did what they did was -- and then they wound up sending advanced notices -- was, all right, we'll say that because of

the allegations against Mr. Peizer, the agreement with Acuitas Capital is null and void, then they send immediately or shortly thereafter, advance notices through SEPA saying, give me money, and they get it.

THE COURT: Okay. Next question: Ideanomics says that this is a non-irreparable harm. In other words, even if you don't convert now, either you could convert later or you could articulate a theory of monetary damage that would allow you to make good. What's wrong with that argument?

MR. KRATENSTEIN: Well, your Honor -- and I know you're familiar with the case law here -- all you have to do is read their 10-K. I mean, it is rife with disclosures about the perilous state of this company's affairs. We are concerned that if we have to litigate this case fully, which could take months or longer, that the company may not here by the time we get a monetary --

THE COURT: Right. I got that. So let's play that out.

MR. KRATENSTEIN: Okay.

THE COURT: Suppose one assumes that Ideanomics's public disclosures are a foreshadowing of a bankruptcy filing. What good does it do you to have their shares?

MR. KRATENSTEIN: None, because they're worthless.

THE COURT: So if it's bad enough to lead to bankruptcy, you're out of luck either way?

MR. KRATENSTEIN: Not necessarily. Time is important.

So when Acuitas Capital made this investment -- and this is actually a point made by Ideanomics -- it knew that the company Ideanomics was in some distress. That is why the transaction was structured as essentially a 90-day transaction. We'll give you $20 million; you'll give us these convertible securities; you'll be locked up for 90 days; everybody understood that was so that the convertible securities could be exercised in that time and sold without there being dilution from other sources.

THE COURT: I see. In other words, the value to you is you're hoping that the company will survive but you can sell the shares in the interim and hope that the stock prices bounced a bit so that you make back more than your $20 million?

MR. KRATENSTEIN: Yes. We're giving them essentially what is -- what wound up being a short-term capital infusion in exchange for stock. And then the deal is now we can sell that stock within the 90 days without risk of dilution. And we believe, we obviously went to -- Acuitas Capital obviously wouldn't have made the deal if it did not think that Ideanomics was going to survive at least 90 days.

THE COURT: Right. Okay.

MR. KRATENSTEIN: But now we're talking beyond that.

THE COURT: The value to you is either, in the short term, selling it, or, in the long term, that it not go

bankrupt.

I suppose there's a scenario under which the company goes bankrupt but the shares are not valueless, depending on what the intellectual property, or whatever, fetches.

MR. KRATENSTEIN: Yes. I suppose. And not being a bankruptcy expert, I mean, in my experience in bankruptcy, it's very hard for the equity holders to get very much, if anything. Usually the debt is ahead of that, as you know.

THE COURT: Right.

MR. KRATENSTEIN: So if there's a bankruptcy, I am reasonably confident saying that Acuitas Capital's stock would be worthless.

That said, your original point is correct: Acuitas Capital had optionality. If it wanted to get out in 90 days, sell the stock, convert it and sell the stock, that was its right. If it wanted to hold the stock because something good happened to the company in 90 days, got more -- whatever, some good news, they could have done that too. That's up to them. They bought that optionality.

THE COURT: Okay. Next question involves the shares sales to YA. I take it your view is that that's a between-the-eyes breach of the agreement you have?

MR. KRATENSTEIN: Correct.

THE COURT: And one of the pieces of relief that you seek in your reply brief is to extend the lock-up by another 48

days?

MR. KRATENSTEIN: Correct.

THE COURT: I take it I don't need to decide that now. From your perspective, all that I need to do here is enforce the lock-up through May 2nd and you can brief next week whether to add 48 days to that, but one of the concerns I have in the reply brief request, only as a matter of process, that came in overnight. The other side is entitled to respond. Nothing turns to you, for now, on whether you get relief through May 2nd or May 2nd plus 48 days?

MR. KRATENSTEIN: Not at this moment. As long as it's decided before May 2nd --

THE COURT: May 2nd.

MR. KRATENSTEIN: -- then we're fine.

THE COURT: Okay. Next question: Do you know what's become of the money that was received by Ideanomics pursuant to selling shares to YA?

MR. KRATENSTEIN: No. We assume it was used for operations, but we don't know.

THE COURT: But I assume you're asking me to lock that up?

MR. KRATENSTEIN: Actually, we did have a footnote. In the same footnote you're talking about, we said, and the other thing you could do is attach that three plus million dollars. In our proposed order, because we asked for an

extension of the lock-up, we didn't include that because we felt that that relief would get us where we needed to be without having to attach any funds.

THE COURT: Well, look, it seems to me that the right answer here, if you're right, is, to the extent that Ideanomics hasn't spent that money, it shouldn't be spending it.

MR. KRATENSTEIN: I mean, we don't --

THE COURT: That just seems to me that if that's a breach, you know, maybe they can work out some arrangement with you, but at the end of the day, that money needs to be available potentially for you.

MR. KRATENSTEIN: We don't disagree.

THE COURT: Okay. All right.

Okay. Mr. Bordetsky.

MR. BORDETSKY: Your Honor.

THE COURT: First of all, I appreciate that I am amply able to distinguish between outside and inside counsel. So don't take the tone as personal.

MR. BORDETSKY: I do not, your Honor.

THE COURT: But it looks as if your general counsel skipped a couple of years of law school. What's with this insider trading theory? That's just bonkers.

MR. BORDETSKY: So a few points on that, your Honor --

THE COURT: That's just character assassination.

MR. BORDETSKY: Well, the documents --

Let me take a step back because you're asking me a thought process of someone, and we put together papers, so allow me to provide the Court --

THE COURT: Sure. Look, but let me, just because time is short --

MR. BORDETSKY: Understood.

THE COURT: -- is Ideanomics still pursuing the theory that this California indictment of an executive of Acuitas involving alleged insider trading in a separate entity has some bearing on Acuitas Capital LLC's conversion rights? If you're not pursuing the argument, we can move past it.

MR. BORDETSKY: No. We are, your Honor, because the position is this -- and if I didn't clarify it in my papers my apologies -- that Mr. Peizer is the CEO of what I'm going to call Holding, the entity to which he is codefendant in the SEC action, as well as Capital. And we've provided the Court with papers that identify the fact that as the CEO, he controls everything in terms of what's going where. And we've got examples of the fact that, I believe, it was either the *Crede* or the *FingerMotion* papers that we attached, your Honor, where in essence, the statement says on the 13G filing where we, Holding, are acquiring the shares that Capital has. So the concern that we have, your Honor, is that if the insider trading -- if there were funds that were improperly utilized, received, and were put into Holding, because I don't think

there's a dispute that the funds at issue were put into Holding, if Holding funded Capital and those funds were then utilized for the purposes of the investment into my client for the purpose of then utilizing the shares and the warrants to get a return, a significant return on it, it's washing.

THE COURT: Okay.

MR. BORDETSKY: That's the concern that we had.

THE COURT: Okay. Let me work this through.

MR. BORDETSKY: Yes.

THE COURT: Your argument doesn't turn on this CEO's character. So far as you're concerned, he could be Mother Teresa, Jack the Ripper, or anything in between, it doesn't matter, your concern is that if it's dirty money that was used to fund the $20 million in Ideanomics, there would be a scenario under which that money could be forfeited or something like that?

MR. BORDETSKY: Absolutely.

THE COURT: Am I articulating that right?

MR. BORDETSKY: That is correct. And to be clear, we didn't -- we did mention the felony conviction of Mr. Wachs, but we didn't -- this wasn't an attempt at a character assassination.

THE COURT: Well, wait a minute.

MR. BORDETSKY: But the concern was that there's -- there's an allegation that, as a public company, we cannot be

included in any of that.

THE COURT: All right. But the logic chain here is effectively a forfeiture one?

MR. BORDETSKY: Absolutely.

THE COURT: That it's dirty money?

MR. BORDETSKY: Absolutely.

THE COURT: All right. Apart from that possibility --

MR. BORDETSKY: Yes.

THE COURT: -- do you have anything concrete that says that the money that the CEO ostensibly used to buy the shares that are the subject of the insider trading charge, any factual basis to contend that that's the same money that essentially wound up being used to fund Ideanomics? I mean, is it just speculation?

MR. BORDETSKY: So the quick answer is, no.

It's always good to answer a judge, the question that's asked.

THE COURT: Thank you.

MR. BORDETSKY: But the concern, your Honor, that we have is with respect to -- the allegations are not amorphous. The allegations don't come from perhaps a business partner who was upset with respect to the process. The allegations come from the Securities and Exchange Commission and the Department of Justice.

And while I appreciate they are just allegations, my

client's obligations -- my client's obligation is to its shareholders.

THE COURT: I know. I mean, look, I mean, I appreciate that, but that truism doesn't mean that you can speculate. I mean, there's no concrete basis to think that Ideanomics was just funded with dirty money. If so, I assume you'd be happy to give it back right now.

MR. BORDETSKY: We've actually --

THE COURT: Let me ask you this: Why don't you just give Acuitas back its $20 million?

MR. BORDETSKY: We are --

I'm sorry.

THE COURT: If you're concerned about it being radioactive money, give the money back. I'm sure they, at this point, given what's happened, they would be happy to take a mulligan.

MR. BORDETSKY: The interesting point on that, your Honor, is prior, in terms of the discussions back and forth with the parties, there was that discussion of, we will give that plus --

THE COURT: Right.

MR. BORDETSKY: -- a sweetener, if you will, and that was rejected, but with respect to the funds -- the funds aren't there.

THE COURT: That's the problem.

MR. BORDETSKY: To be clear, the funds aren't there.

But what we said was, and we put this in the papers that, to the extent that -- and I'm hopeful the Court will ask questions with respect to the irreparable harm --

THE COURT: I'll get there.

MR. BORDETSKY: -- and with respect to the 15(a), but what we said was, look, if the Court wants us to deposit the shares with the Court, let's let the parties who would contend that there's an issue, let them resolve it.

THE COURT: But, look, here's the issue: First of all, it's speculative that there was dirty money; but, second of all, even if there were, that wouldn't make the shares that were then exchanged themselves dirty. And to the extent the concern is getting your money back, Acuitas Capital has offered, if it chose to sell the shares that it gains by conversion, to escrow those proceeds. So one way or the other, I'm not following how the unresolved indictment of this individual has any bearing here.

MR. BORDETSKY: So our understanding, my understanding, with respect to the forfeitures that, to use the Court's phrase of "dirty money", that if that -- an investment down the line associated with those originating funds that are dirty, that investment is subject to forfeiture and that investment is problematic and that investment can be a target for a clawback.

And that's the concern and that's what we indicated in correspondence, and that's why we dropped the foot -- the statement in the papers of, have the Court order us to put it in the --

THE COURT: All right.

MR. BORDETSKY: -- with the Court, deposit it with the Clerk.

THE COURT: Okay. Let's turn to the 15(a) point.

MR. BORDETSKY: Yes.

THE COURT: Give me the one-minute version of that.

MR. BORDETSKY: Not desperation. To be clear, to be clear, when I got the papers Monday, I'm familiar with the arguments. The reality is here that this is an entity whose business is set up for the purpose of acquiring shares directly from the issuers at a discounted rate, to sell those shares directly into the marketplace for its own benefit through its own account. That is the indicia of a dealer, and the law says that if this is the --

THE COURT: That's not a dealer. That's somebody who is a day trader. That's a short-term trader.

MR. BORDETSKY: Respectfully, your Honor --

THE COURT: A dealer is like a market maker, something like that. This is not somebody who is making markets. This is an entity that, you know, viewed cynically -- but nothing wrong with that -- sees an opportunity for a quick profit.

MR. BORDETSKY: So I would disagree with the Court's interpretation. I had the opportunity to brief this issue distinctly, and counsel is correct: The Southern District has repeatedly said if a transaction can otherwise be effectuated without -- without a securities transaction, then it's not a security.

We believe -- on Monday, your Honor, in the case of *EMA Financial v. Joey New York*, the Second Circuit heard a small bit of argument on this issue. The usury claim, I think, is going to subsume that case, but it hasn't been resolved in the Second Circuit. And there is a split because the circuits in the cases that have found dealer, regardless of whether it's an individual, if the person or entity is doing this as their business to acquire -- the day trader, your Honor, is not buying securities directly from the issuer. The day trader is going into the market.

And by virtue of the SPA, the differential between the SPA case, which we have here, versus the cases which have been deemed not to be securities, and while I take -- while I disagree with that whole thing and am hopeful that we get to the Second Circuit on that, but there's a distinct difference here. With the promissory note cases, which was the totality of the cases, one was before Judge Carter on this issue, the Court found as follows: The note itself identified two options for repayment. You could repay cash at the 12 percent

interest, or we can execute the conversions at a discounted rate, 40 percent to market. I'm pulling a number up. And the courts held, beginning with Judge Sullivan in, I believe, the *LG* case, because that option is there, it's not a security.

Here, your Honor, the moment -- they can't enter into the transaction. The SPA is a securities transaction in and of itself. That's one. Two, all they're doing is effectuating securities transactions throughout this. The moment that they send the funds in lieu of the shares --

THE COURT: Wait. So your client, you're saying, knowingly participated in an illegal contract? In other words --

MR. BORDETSKY: So, no, is the answer --

THE COURT: In other words, if the agreement is illegal, that would be true regardless of the attempt to carry it out here.

MR. BORDETSKY: Well, as to the success-on-the-merits claim here, your Honor, our position is you can't even get to the contract because the issue that has to be resolved -- the contract -- the law says the contracts are voidable at the option of the counter-party.

THE COURT: Well, why did your client enter into an agreement which it now is saying has, at its root, an illegality?

MR. BORDETSKY: Didn't know. Didn't know, your Honor.

THE COURT: Because it didn't read the law? I mean, it's not that there's some fact that has changed.

MR. BORDETSKY: Well --

THE COURT: You're saying that on the face of agreement, this was impermissible?

MR. BORDETSKY: They did not know and they -- Ideanomics didn't know that to effectuate these transactions the plaintiff had to be a registered dealer. And in fairness to the process, the SEC has been pursuing this for the last -- I'm going to use a round number, your Honor -- five years with respect to this.

And there was a case out of the Southern District of Florida, *Allagarby* -- in fairness, it wasn't briefed, I want to make that clear -- where the Court said of an individual who had 115 of these trades, you're a dealer, you're not a trader, you're a dealer, and the process itself requires a substantial fact-finding because, if, in fact, this is an illegal or if this is a voidable contract, your Honor, we don't get to the success-on-the-merits claim because there's no contract to enforce.

So that's our position with respect to the process because, again, your Honor, they're getting this at a discount, that there's risk. When my friend says, there's risks, so, therefore, we're not a dealer, with deference to my friend's argument, that's just not accurate, because if I choose to fund

an entity with this very note, there's always a risk that the company goes out of business tomorrow. It's a risk --

THE COURT: Let me turn to irreparable harm.

MR. BORDETSKY: Yes.

THE COURT: What's wrong with the argument that if Acuitas doesn't convert now it may never be able to convert?

MR. BORDETSKY: You heard in response to that question to the plaintiff that they can sell it, there's a dollar amount there -- the moment that the Court heard we can sell it, we can sell the shares, we want to sell the shares, we provided this Court to the dollar what the initial tranche was valued at.

THE COURT: Right.

MR. BORDETSKY: Damages associated with a failure to convert are easily calculable.

THE COURT: Sorry. Look, here's the problem: That works better if your client is durably going to be there and capitalized, but the client's public financials are all but screaming, we're on fumes.

MR. BORDETSKY: Sure.

THE COURT: And so if you operate on the assumption that the best way for Acuitas Capital to salvage some of its investment is to convert and do what it can by selling the shares but that two weeks from now, there may be no market for them, is there some money that Ideanomics has set aside for Acuitas Capital so that when it files its breach of contract

suit here, it will be able to recover it —— that is, money that is outside of bankruptcy? I mean, I'm not seeing, in a concrete world, a route to a recovery here if you assume the worst.

MR. BORDETSKY: So allow me to answer the question and then address a point that was raised by the Court.

THE COURT: Just answer my question, please.

MR. BORDETSKY: Yes. So the question is, I don't know whether the funds have been set aside. I can't --

THE COURT: But it was a rhetorical question. If there was a bankruptcy, unless there was some priority position that Acuitas had, it can't just set aside money for Acuitas. That would be available to all the other claimants. It was a rhetorical point --

MR. BORDETSKY: Sorry.

THE COURT: -- which is my way of saying, if they don't convert now and at least do what they can in the market with these shares, they may get nothing for their $20 million, and Acuitas Capital -- and Ideanomics is not the Fed. There's no money it can attach.

MR. BORDETSKY: Sure. To respond to that, your Honor, a few different points: The same argument was raised in the *Crede* case before Justice Sherwood.

And by the way, I owe both this Court and Justice Sherwood, your colleague in New York Supreme -- with a name

like Bordetsky, I shouldn't misspell a name. So, my apologies.

THE COURT: Sorry. Time is short.

MR. BORDETSKY: It's the same argument, your Honor. There's this metrics of insolvency. We're going to show you the public filings. And Judge Sherwood, again, we attached the papers because it was -- it was incredible, the almost near identical nature of the argument, and Judge Sherwood said, just because --

THE COURT: No disrespect. I'm in Federal Court. I don't care. I want to --

MR. BORDETSKY: Fair enough.

Then let me go to Judge Carter in the *EMA v. Vystar* case and Judge Spatt in the *Vis* case, which they said in essence, no, if this isn't available, the possibility, everything that you're hearing from the plaintiff is maybe, possibility, it may be, and they actually refer to --

THE COURT: No. No. No. Possibility, maybe, speculative is there was dirty money used in the investment. The plaintiffs are citing to statements made by your client that suggest that the company is on life support.

MR. BORDETSKY: So if I can address that, your Honor, we got a letter with -- your Honor identified the filings, and yesterday we got a letter from the plaintiff that broke down the filings, and we had -- counsel and I had some confusion as to what was going to take place today. And this morning, I

sent the Court a breakdown associated with the filing. And I don't know if the Court had the opportunity to look at the March 31st letter, which is document number 40, but if it did or if it will, it will find that the quotes were taken -- an 8-K filing -- a 10-K filing, your Honor, is a public company saying, the world could fall apart, if you're going to invest, the world could fall apart, and put every single possible problem, and in the 8-K that was filed for the year 2021, that was filed September 2, 2022, the very quotes that are utilized --

THE COURT: But --

MR. BORDETSKY: -- but it's a constant, your Honor. I guess that's my point. They wanted --

THE COURT: The stock price now is what?

MR. BORDETSKY: Same, 11-ish, 11 cents.

THE COURT: 11 cents?

MR. BORDETSKY: Yes.

THE COURT: Okay. What was it at the time of the contract between Acuitas and Ideanomics?

MR. BORDETSKY: So it was -- 28 cents. After the first sale, that went to 16 cents. And we've got the exact numbers in our papers. Then after the second sale by -- it went to 13 or 12.

THE COURT: And what was it in September?

MR. BORDETSKY: What was it in September?

THE COURT: When you say the same quotes appeared.

MR. BORDETSKY: September of '22?

THE COURT: Whatever you said, you said that these quotes are recycled.

MR. BORDETSKY: I don't have that. I think it's in one of the sets of papers. I don't have that to memory.

THE COURT: I mean, look, everything I've read here suggests that it's --

MR. BORDETSKY: But this is --

THE COURT: -- that your client is circling the drain.

MR. BORDETSKY: But, your Honor, with deference to plaintiff's position, that's what they do. They come into companies that -- we concede. We are a growth -- emerging-growth company. We take money. We don't doubt that. They're saying in the first instance, we review all your financials because in the SPA no less than twelve times, they identify the SPA reports. We've reviewed it. They don't contest that. And now what they're saying is, aha, now we're going to use the very information that we knew of prior to investing to say you're falling apart.

THE COURT: All right.

MR. BORDETSKY: It doesn't make sense, your Honor.

THE COURT: Mr. Bordetsky, let me ask you this: Let's assume, for argument's sake, that your client was informed that its reasons for claiming illegality of the contract or that it

would be getting too close to dirty money were it to perform were rejected such that your client did not have a basis to not comply with the contract. Is there some reason it doesn't want to?

MR. BORDETSKY: No.

THE COURT: Great.

MR. BORDETSKY: I mean, the letter from my --

THE COURT: I mean, in other words, I was exploring with your adversary, why, as a matter of tactics or strategy, Ideanomics seemed to be resisting complying with a clear contractual obligation and why the excuses it was giving struck the Court as unpersuasive, shall we say, and I was exploring with your adversary, as a matter of business logic, why it might be that Ideanomics didn't want to convert.

Are you telling me if we get rid of the ostensibly principled reasons that Ideanomics has articulated, insider trading or a dealer, get rid of those things, are you telling me that Ideanomics is happy to comply with its contractual obligation, there's no harm to it?

MR. BORDETSKY: I'm saying at -- if, on the merits of the case, after discovery has demonstrated that this may be --

THE COURT: No. No. No. I'm just saying, just indulge this. You made your arguments --

MR. BORDETSKY: This hypothetical?

THE COURT: Look, you have to answer the question or I

assume the worst. The question is as follows: You've given me a couple of arguments --

MR. BORDETSKY: Yes.

THE COURT: -- you can tell I'm not buying. Assume that that sticks and I don't buy either the insider trading or the dealer rationalizations. Is there some business reason why it is against your client's interest to convert?

MR. BORDETSKY: They -- the only reason that they didn't -- No.

THE COURT: And is there any impediment at this point in converting?

MR. BORDETSKY: I can't speak to that. I can't speak to that now, your Honor, in terms of the process, particularly in light of the fact that, as we've indicated with the plethora of authority from this district, Courts are loath to issue conjunctive relief on conversion issues, on this very issue.

THE COURT: May I ask you, your client agreed that the harm would be irreparable? I mean, that's part of the agreement.

MR. BORDETSKY: May I address that, your Honor?

THE COURT: Briefly.

MR. BORDETSKY: Because this issue came up in the *EMA* case, and Judge Carter provided a wonderful analysis associated with this. It's persuasive; it's not dispositive --

THE COURT: I know that.

MR. BORDETSKY: -- and the first question is, are the stocks --

THE COURT: But it's persuasive but your client said it and it is now saying something different.

MR. BORDETSKY: So, thus, there's an analysis that takes place. The first analysis, is this a unique trading stock. The answer is, no. There's no allegation to it. There's no mention in the papers to it.

The second analysis that has to be conducted in terms of this process, is, is this is a publicly traded stock where the shares are available? And the answer is, yes.

The next aspect is the insolvency issue, and this very type of analysis that plaintiff has provided to the Court was provided in the *EMA* case and it was provided in the *Vis* case. And it was rejected -- and it was rejected on the grounds that you cannot just simply say, well, maybe, sort of, it may be. The law is clear in this district that with respect to conversions, when there's a dollar amount that can be resolved, that the breach of contract -- and if it can be resolved by a dollar amount, whether that's available or not, is, in fact, a reason to reject an application.

THE COURT: Does your client have the shares available to convert, if it converted at today's stock price, the amount that Acuitas is entitled to? Does it have the --

MR. BORDETSKY: You mean the two tranches?

THE COURT: Does it have the headroom to carry those out?

MR. BORDETSKY: I believe so. The two tranches?

THE COURT: All right. I'm asking --

MR. BORDETSKY: I believe so. I can't -- I can't definitively answer that, your Honor, but I do believe that they do.

THE COURT: Look, I'm not --

MR. BORDETSKY: We offered to put it with the Court and I wouldn't have made that --

THE COURT: What I'm not hearing is any articulation of any equity why your client -- if I reject the idea that there's an illegality, what I haven't heard is word one of why there's some equity in the balance that would favor your client.

Let me ask you this --

MR. BORDETSKY: Well --

THE COURT: Let me ask you this next question.

MR. BORDETSKY: Sure.

THE COURT: Assuming that the SPA is valid, was it lawful for your client to sell the shares to YA, assuming that the SPA is valid?

MR. BORDETSKY: Was it --

THE COURT: Was it a breach of the SPA?

MR. BORDETSKY: I think that's an interpretation in

terms of the process.

THE COURT: Well --

MR. BORDETSKY: I can't, you know, we're --

THE COURT: You're not prepared to defend it?

MR. BORDETSKY: No. At this --

THE COURT: I mean --

MR. BORDETSKY: The language in the contract is clear. We don't dispute that.

THE COURT: I mean, look, I'm giving you a chance here because it looks like a between-the-eyes breach, based on your client's say-so, that its antecedent agreement with Acuitas is null and void. But if you assume the opposite, which is that it's a valid agreement, is there a responsible argument a lawyer can make as to why the sale to YA was not a breach?

MR. BORDETSKY: Sure. It's -- again, it's a tie-in because I think the position of the -- of Ideanomics is that we had an agreement that there was a breach by virtue of the funding issue, and that there was -- there's an issue with respect to the enforceability, and, therefore --

THE COURT: Why did you not go to a court to seek a declaratory judgment? In other words, if your theory about selling to YA is, we think that our agreement with Acuitas is illegal, but we recognize that if it's not null and void, we're breaching it, why not do what the other side did, go to court, get a declaratory judgment, instead of the self-help of saying,

we declare it's illegal and we're now going to sell to YA?

MR. BORDETSKY: I can't speak to before I was involved.

THE COURT: Was that before your time?

MR. BORDETSKY: I can't speak to that.

THE COURT: Were you retained --

MR. BORDETSKY: I was retained Monday, your Honor.

THE COURT: Okay.

MR. BORDETSKY: Monday afternoon. So I cannot speak to that.

THE COURT: Okay.

MR. BORDETSKY: And, you know, there is a distinct difference between a litigator versus an in-house counsel that's far removed from the process.

THE COURT: You know what, that's where I began with you and I'll end with that as well.

Let me just follow up with plaintiff's counsel on a few things.

MR. KRATENSTEIN: Yes, your Honor.

THE COURT: I'm sorry. One other question, Mr. Bordetsky, and you may not know the answer.

MR. BORDETSKY: Yes, sir.

THE COURT: What's become of the fruits of the sale to YA?

MR. BORDETSKY: I can't speak to that.

THE COURT: All right. Thank you.

MR. BORDETSKY: I can't speak to that.

THE COURT: Look, I want to come back to the dealer point.

MR. KRATENSTEIN: Yes.

THE COURT: Give me, as succinctly as you can, your best response to that, informed now by what you've heard from Mr. Bordetsky.

MR. KRATENSTEIN: It's a multifactor test as whether you're a dealer. There are such a thing as investors, there are traders, there are brokers, and there are dealers. Here, you have an investor and/or a trader. They invest in companies. They make money from companies. One of the key factors that Courts look at in the multifactor test is how much risk was the investor taking. Here, there was plenty of risk, including as demonstrated by the fact that I'm standing here today, but putting that aside, even if I wasn't standing here today -- and we enumerated several of these risks in our papers -- there was the risk that the shares might not be registered. And, in fact, there was a delay in the registration, which is one of the reasons that we were under -- that Acuitas Capital was under some time pressure to convert and sell.

There's also, of course, the danger -- the risks concerning the stock price. I want to talk briefly about the

First and Fifth Circuit cases that they rely on. In those cases, on the face of the contracts themselves, these were broker-dealers who were hired specifically to sell stock, and the *Aptech* case that we cited from this district goes through that chapter and verse.

THE COURT: Your client is not a broker-dealer?

MR. KRATENSTEIN: No.

THE COURT: Has your client ever been a broker-dealer?

MR. KRATENSTEIN: Not to my knowledge.

THE COURT: What line is Acuitas in?

MR. KRATENSTEIN: They invest in companies.

THE COURT: Go ahead.

MR. KRATENSTEIN: So that's the answer to the dealer point, your Honor.

THE COURT: Okay. All right. Assuming that relief substantially along the lines of where you are seeking is granted, and assuming for the time being that the May 2nd rather than the June 19th date is used, presumably you don't have an interest in driving Ideanomics into bankruptcy, your client's interests are better served in finding a way to work with them to salvage something, hopefully. Right?

MR. KRATENSTEIN: Yes.

THE COURT: I mean, otherwise, yes, maybe you can sell this penny stock in the market and get a little something for it, vanishingly little, maybe even more vanishingly, depending

on what the restrictions are. What's the game plan? I mean, in other words, if you get this relief, it enhances your bargaining power. But what's the game plan in working with Ideanomics to hopefully do something productive here?

MR. KRATENSTEIN: Right. Well, let me take a step back, and I appreciate the question.

As you know from the papers, there was a buyout discussion and there was a disagreement between the parties as to the economics of that buyout and whether it would work. And one of the reasons -- which is in the papers, so I don't think I'm giving anything away here -- was that my client felt like it was taking a risk and didn't just want to get its investment back, it wanted a return on the investment. And then the talks broke down, and then there was the repudiation of the contract.

So now we're left with the option of, all right, they apparently don't want to talk to us anymore. That's where the discussions stopped. They sent us the March 7th letter repudiating. Now we have to go running to court. Now we have to try to get this stopped and just do the best we can, as you said. I don't know what happens next between them. I suppose a business discussion could happen.

Acuitas Capital was put in the unenviable position of just now trying to salvage the situation. I can only speculate about whether there's a business deal that could now be reached that might be beneficial to the parties.

THE COURT: Right. Look, I mean, I guess where I'm going is, just because you have your contract price doesn't mean that you have ultimately an interest in burning down Ideanomics.

MR. KRATENSTEIN: Of course not.

THE COURT: So, yes, it's possible that your client's best interests will be served by converting at -- hypothetical here -- at 11 cents, and then selling it at 7 cents or whatever it's trading at on Tuesday. It's also possible that with the benefit of the Court's enforcing your contract rights there's a little more of alignment of interest between the two tables here and your bargaining power will be greater than it was yesterday in a few days, business days, from now, and maybe, working together, there's some way of salvaging something here.

I'm not in the middle of settling this right now, but I am noting that notwithstanding the antagonism here, the relief you get in the short term has you as bedfellows.

MR. KRATENSTEIN: I don't disagree with anything you just said.

THE COURT: So what's your client's headspace about this?

MR. KRATENSTEIN: Well, I don't want to -- I don't want to violate -- let me say this, I feel comfortable saying this: After we filed this motion, we did make a proposal. I don't want to get into the substance of that proposal because I

don't think that that would be appropriate.

THE COURT: No.

MR. KRATENSTEIN: But we did make a proposal that we thought could resolve this that would be fair to both parties and that proposal was not accepted.

I do not know if, depending on how this Court's ruling goes, the parties will then, as they often do after an important Court ruling, say, all right, here's what the Court has said, now we both need to reassess where we are and have another discussion.

THE COURT: All right. I mean, look, I'm making this point. This is born of eleven and a half years' experience on the bench. One of the best things I can do is provide clarity because uncertainty, legal uncertainty is one of the great problems, and when a Court at least puts people in a better position to arrive at the same expected value of things, they tend to settle and work better together. One of the reasons I wanted to have you here was to resolve what I could as quickly as I could so that together, for better or worse, you're dealing with one less big imponderable, and you will be within an hour dealing with one less big imponderable. But I hope that everyone emerges with a spirit of trying to find a way to work together.

Acuitas may choose to bail and sell. That's fine. Whatever. It's entitled to do that and salvage what it can,

but I would not be happy to learn that the approach was, let's burn the thing down.

MR. KRATENSTEIN: No. That's not -- that's not -- your Honor said it perfectly. That's not in our interest. As with any discussion, it takes two to tango, but that's --

THE COURT: Okay.

MR. KRATENSTEIN: What you say is correct and we understand.

THE COURT: All right. One moment.

(Discussion off the record)

THE COURT: Counsel, I'll be back at 4:15 with a bench ruling.

MR. BORDETSKY: Your Honor, may we just address one point.

THE COURT: Briefly.

MR. BORDETSKY: Briefly, just with respect to timing issues. Based upon receiving the papers and working, the time I got them, the answer is due next week. We would just like more time --

THE COURT: For the answer to the --

MR. BORDETSKY: For the response to the complaint.

THE COURT: Let's take that up after the break.

MR. BORDETSKY: I just wanted to address it so that the Court, it was on -- counsel and I spoke beforehand.

THE COURT: I won't rule on that pending hearing

further from you. But if there's a joint proposal on that, I would be happy to.

MR. BORDETSKY: Great. Thank you, your Honor.

MR. KRATENSTEIN: Thank you, your Honor.

(Recess)

(In open court)

THE COURT: Okay. Be seated.

All right. I have a brief bench ruling to read:

I'm now going to issue a ruling on plaintiff Acuitas Capital LLC's motion for a preliminary injunction against defendant Ideanomics, Inc. For your planning purposes, there will not be a written decision. I will instead issue a bottom-line order reflecting the Court's resolution of the motion. To the extent the Court's reasoning is significant to counsel, you will need to order this transcript.

Acuitas moves for the Court to enter an order directing Ideanomics to deliver to Acuitas within one business day 4,901,960 registered common shares of Ideanomics stock pursuant to its March 3rd, 2023 conversion notice, and 7,974,481 registered common shares of Ideanomics stocks pursuant to its March 6th, 2023 exercise notice. Acuitas also seeks to enjoin Ideanomics from offering, lending, or otherwise transacting in its shares of capital stock through and including May 2nd, 2023, unless its common stock is trading at least 20% above the conversion price of preferred stock. In

its proposed order last night, Acuitas proposed that the May 2nd date be extended by 48 days until June 19th, 2023.

I have reviewed in detail the parties' memoranda of law, supporting declarations, end the materials attached to those declarations. I want to compliment counsel for both sides from their excellent submissions, which have been of tremendous assistance to the Court, and for the energetic colloquy today, which was informative to the Court.

The Court adopts the account of facts as provided by Acuitas as Ideanomics has not set forth any meaningfully contrary account. The relevant facts here are as follows: On November 14th, 2022, Acuitas and Ideanomics entered into a Securities Purchase Agreement, or the SPA. Under the terms of the SPA, Acuitas purchased $20 million of convertible securities through three separate investments. The last of these took place on February 7th, 2023. The SPA provided for Acuitas to convert the preferred stock that it received into common shares at a specified conversion price. The SPA also provided a cashless exercise option, under which, if the Ideanomics stock were trading below a specified exercise price, Acuitas could convert its warrants into common shares pursuant to a specified exchange formula. In exchange for the investment, Ideanomics agreed to a lock-up provision that prohibited it from offering, selling, or otherwise transferring shares of its capital stock for a period of 90 days, ending on

May 2nd, 2023. If, however, Ideanomics's common stock was trading at a price at least 20% higher than the price of its preferred stock, Ideanomics would be entitled to sell up to 3% of its outstanding common stock under its Standby Equity Purchase Agreement with YA II PN or YA, a third party to this case.

On February 8th, 2023, after Acuitas purchased its third and final tranche of convertible securities, Ideanomics initiated negotiations with Acuitas to secure further investment. Around this time, on February 2nd, 2023, and February 15th, 2023, Acuitas converted $10 million worth of preferred stock into common stock in two transactions.

The parties, however, were ultimately unable to agree on the terms of a buyout. On February 28th, 2023, Ideanomics sent to Acuitas a draft termination agreement for the SPA that, Acuitas alleges, improperly valued the warrants. Shortly thereafter, Acuitas attempted two conversions. First, on March 3rd, 2023, Acuitas sent a Conversion Notice to Ideanomics in order to convert $1 million worth of preferred stock into 4,901,960 registered common shares; and second, on March 6th, 2023, Acuitas sent an Exercise Notice to Ideanomics in order to convert 5,555,555 Warrants into 7,974,481 registered common shares. Ideanomics, however, refused to honor these notices. Instead, on March 7th, 2023, Ideanomics declared to Acuitas that the SPA was "null and void"

due to an indictment of Acuitas's CEO and its parent company for insider trading. This, Ideanomics contended, constituted a breach of the SPA's provision prohibiting the use of funds derived from illegal activity.

Acuitas represents that Ideanomics is in a precarious financial position. That is confirmed by Ideanomics's declining stock price, which, as of the filing of the pending motion, was at an all-time low, under 11 cents per share. It is also consistent with various warnings and disclosures in Ideanomics's public filings, albeit ones that had been articulated in earlier filings. That Ideanomics is in a challenging financial position is also corroborated by a development I will address later, which is Ideanomics's recent sale of stock to YA. That sale, insofar as it appears to be a clear breach of the SPA, bespeaks apparent desperation suggestive of dire financial straits.

Acuitas now seeks injunctive relief. It contends that Ideanomics has breached the SPA by refusing to honor its Conversion Notice and Exercise Notice. It contends that Ideanomics would be unlikely to satisfy any final judgment in light of its dire financial situation, whereas receiving the shares to which it is entitled under the SPA would afford it some value insofar as these represent a sellable equity stake in the company. Ideanomics counters that monetary damages are adequate to remedy any alleged breaches and that, in any event,

the SPA is void.

To justify a preliminary injunction under Federal Rule of Civil Procedure 65, Acuitas must demonstrate: (1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a sufficiently serious question going to the merits to make them a fair ground for trial, with the balance of hardships tipping decidedly in its favor; and (3) that the public's interest weighs in favor of granting the injunction. For the injunction sought here -- that would alter, rather than maintain, the status quo -- Acuitas must show a "clear" or "substantial" likelihood of success on the merits. I draw upon *Metropolitan Taxicab Board of Trade v. City of New York*, 615 F.3d 152 (2d Cir. 2010), and *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286 (2d Cir. 2012), for these familiar standards.

I will address the alleged failure to honor the conversion notices first, and then address the alleged breach of the lock-up provision.

As to the first element of the irreparable harm, the Court finds that Acuitas has met its burden to establish irreparable harm with respect to Ideanomics's refusal to honor the Conversion Notice and Exercise Notice. I am persuaded by the papers that, if such relief is not granted, there is a serious risk that monetary damages will not be available to

Acuitas. Ideanomics's most recent 10-K, filed in the docket of this case yesterday, noted that it had "incurred significant losses" since its inception and anticipated continued losses in the foreseeable future. The filing reported that Ideanomics is not profitable and has incurred hundreds of millions of dollars of losses in the past several years, with an operating loss of $282.1 million in the 2022 calendar year. Furthermore, Ideanomics states that it lacks sufficient funding to support its current operating model and that its sustained losses and limited capital raise "substantial doubt about our financial viability and as to whether we will be able to continue as a going concern." Indeed, Ideanomics was seeking funding from Acuitas just a month ago and recently sought and obtained funding from YA despite an SPA provision preventing that absent a significantly higher stock price. Its 10-K also noted the possibility that its common stock may be delisted due to notices of failure to satisfy Nasdaq's listing rules.

Ideanomics correctly points out that monetary damages are the typical remedy for contractual breaches. However, as many Courts in this Circuit have noted, "a finding of irreparable harm may lie in connection with an action for money damages where the claim involves an obligation owned by an insolvent or a party on the brink of insolvency." *See Alpha Capital Anstalt v. Shiftpixy, Inc.* 432 F. Supp. 3d 326, 340-41 (S.D.N.Y. 2020) (citing cases). Acuitas has made a sufficient

showing that monetary damages are likely to be unavailable at the end of this litigation, in light of Ideanomics's lack of financing, the rapidly declining value of its shares, and its risk of being delisted. As counsel for Acuitas put the point today, its ability to recoup something from its investment may turn on its ability to resell the shares that it obtains via conversion, even if that means selling at a loss. And counsel for Ideanomics today was not able to articulate concretely any way in which Acuitas's economic interests would be protected were it unable to convert. Ideanomics did not, for example, state that it was prepared to repay Acuitas in cash for the $20 million it paid for the conversion or that there is a nonspeculative scenario in which it will be able to do so. Ideanomics hopes to receive funding from its international ventures, but that hope does nothing concretely for Acuitas. Ideanomics has not promised, for example, to transfer that funding to Acuitas in lieu of the shares that Ideanomics is declining to make available to Acuitas.

The bottom line is that Ideanomics as of now has gotten something for something -- 20 million somethings actually -- and is trying to keep it that way. Acuitas's conversion at least gives it the opportunity to salvage something through an equity sale. And the shares Acuitas would receive, in the event of a bankruptcy, may also be worth something depending on Ideanomics's assets minus liabilities

and the existence of preferred claimants. In any event, having the shares would be more valuable than not having them but having only an empty right to convert.

I finally note -- although this is not dispositive -- that the SPA, in provisions 5(b) and 14 itself characterized any failure to honor the notices such as those at issue as ones resulting in "irrepairable harm." That reinforces the finding of irreparable harm.

Turning to likelihood of success on the merits, the Court finds that Acuitas is substantially likely to prevail on the merits of its claim. The terms of the SPA are clear. And both parties undisputedly agreed to the SPA. In its papers, Acuitas has made a compelling showing that, pursuant to the plain language of the SPA, it was entitled to receive the shares sought; and that Ideanomics breached its obligation to honor the Conversion Notice and the Exercise Notice.

Ideanomics's counterarguments largely contend that the SPA is void. I find these stated grounds uncommonly unconvincing. Ideanomics first notes the fact that Acuitas's executive and its parent company have been indicted for insider trading. Ideanomics, however, does not connect that indictment, or the conduct underlying it, to the SPA, or Acuitas, or this controversy, in any way. Critically, Ideanomics does not cite any part of the SPA that would deprive Ideanomics of its conversion right on account of unrelated

charges being brought against an affiliated person or company. Ideanomics's argument based on the insider trading allegation, which really is one of guilt by association, smacks of desperation to somehow avoid the SPA, which bars Ideanomics from selling shares to others until May 2, a lock-up provision which Ideanomics appears now to rue committing to. And at the risk of noting the obvious, an indictment is just an allegation. It does not establish the offense. The bottom line is that this excuse for what otherwise would be a blatant breach of contract is a nonstarter. Ideanomics relatedly offers the theory that the $20 million that Acuitas paid for the contractual conversion right might represent proceeds of insider trading. That is total speculation. Absent substantiation, this theory does not support treating the SPA as void.

Ideanomics next accuses Acuitas of being an "unregistered dealer." That argument was not developed in any way as to be convincing, factually or legally. Acuitas in major respects is clearly a dealer. It took huge risks in entering into this transaction, conduct that that important a factor in determining who is a dealer as opposed to a trader or an investor puts weight on it; in other words, it's an important factor. And, again, Acuitas is not a registered broker-dealer and there are not other indications that make it appear to be feigning as such. All indications are that

Acuitas was what it says it was at all relevant times, an investor. And, again, Ideanomics does not point to any provision of the SPA that disentitles Acuitas to its contractual rights as an investor, even if a regretful one, to the share conversion. The SPA, by all indications, is enforceable by Acuitas.

And those are the only arguments Ideanomics has advanced in defense of what otherwise would be a between-the-eyes breach. And simply put, these arguments are distractions. They appear to be cover stories, rationalizations, because Ideanomics, given its economic straits, would prefer not to issue shares to Acuitas and would really prefer to be free of the lock-up. I note as well that Ideanomics will have protection under the order that the Court will issue in the unlikely event that it can later muster a serious argument why Acuitas is not entitled to the shares. Pursuant to the escrow provision in the proposed injunction and the one that we'll issue, all proceeds from sales of converted stocks will be held in escrow, meaning that Ideanomics would be able to recover the value of these shares if it is able to prove that the SPA is, in fact, void.

For substantially the same reasons I have covered, I also find that the balance of equities tips decisively in favor of granting the injunction. Ideanomics argues that awarding the relief sought here would cause a "fire sale" that depletes

its stock value and creates reputational damages. At the risk of stating the obvious, that appears to be a situation Ideanomics has already created all by itself. That enforcing Acuitas' contractual rights would subject Ideanomics to the lock-up provisions of the SPA is no basis to countenance a breach of those provisions. Strikingly today, counsel for Ideanomics was unable to articulate any way in which Ideanomics would be hurt or claims to be hurt by enforcing the conversion provision. Its sole argument is that the agreement is illegal. The balance of cognizable equities lopsidedly favors Acuitas, which stands to lose its entire investment without getting the shares whose conversion right was its bargained-for consideration.

Let me finally just address the public interest. Generally speaking, the public probably couldn't care less about this dispute between the plaintiff and the defendant, but the public always has an interest in the enforcement of the law accurately, and that is what I will do today.

I will now turn to the separate question of the lock-up provision. Acuitas asks this Court to enforce the lock-up provision of the SPA. In the order to show cause filed with the pending motion for injunctive relief, Acuitas sought enforcement of the lock-up provision until after May 2nd, 2023, per the terms of the original SPA. Then, in its reply brief and supporting papers filed this week, Acuitas alleged

that Ideanomics had breached by selling shares to YA pursuant to the SEPA, and that Ideanomics's recent 10-K referenced these sales of preferred shares under the SEPA. In line with these claims, the reply brief and proposed order granting injunctive relief that was filed last night seeks relief that extends 48 days longer than was originally sought. Specifically, Acuitas seeks enforcement of the lock-up provision through June 19th, 2023. Acuitas also seeks an order of attachment with respect to the $3,482,500 in proceeds that Ideanomics allegedly received from its sale of shares to YA.

There is obvious force to these later requests by Acuitas. However, as a matter of fair process, these requests were made later in the briefing process. And so, Ideanomics has not had an opportunity to respond in full to Acuitas's allegations of the breach of the lock-up provision in connection with the sale of shares to YA. Therefore, for the time being, the Court will grant only the original relief sought as to timing -- that is to say, enforcement of the lock-up provision through May 2nd, 2023.

That said, I am convinced that good reason exists to require that Ideanomics hold in escrow any proceeds it has received from its sale of shares to YA pending briefing on that subject. And there may well be good reason to extend the lock-up by 48 days as requested. I will, therefore, direct that the proceeds from the sale of shares to YA be held in

escrow and not dissipated while the Court hears an urgent second round of briefing as to whether the lock-up provisions were breached, and if so, what, if any, injunctive relief is in order.

As will be detailed in the order to be issued shortly -- and I'll read it aloud in a minute -- the Court will direct that: (1) Ideanomics shall hold in escrow, and not dissipate, the proceeds of any sales to YA, on or after March 7th, 2023, (2) that counsel meet and confer forthwith on any outstanding relief sought in connection with the lock-up provision, and (3) that the parties file any application for relief in connection with that provision no later than Tuesday, April 4th, 2023, at 12 p.m., and any response to such applications being due Wednesday, April 5th, 2023, at 5 p.m. The Court will hold a hearing on Friday, April 7th, 2023, at 11 a.m. to hear argument on any such applications.

Therein ends the bench ruling. And what I'm going to do now is I'm going to read aloud the order that I will issue that grants the preliminary injunction. And I have unsigned copies which thereafter I will hand out to each side but the order should hit ECF shortly.

Okay. Here goes. It's titled "Order Granting Preliminary Injunction" and it bears my name:

On March 31, 2023, the Court held a hearing on the motion of Plaintiff Acuitas Capital, LLC ("Acuitas Capital")

for a preliminary injunction and preliminary declarative relief pursuant to Federal Rule of Civil Procedure 65 and 28 § 2201 (the "Preliminary Injunction Motion").

The Court has reviewed Acuitas Capital's Complaint (ECF No. 1); Acuitas Capital's Order to Show Cause (ECF No. 5); Acuitas Capital's Memorandum of Law in Support of the Preliminary Injunction Motion (ECF No. 6); the Declarations of Terren Peizer, Michael Wachs, and Andrew B. Kratenstein, each dated March 13, 0223, and the exhibits attached thereto (ECF Nos. 7-9); Defendant Ideanomics Inc.'s ("Ideanomics") Memorandum of Law in Opposition to the Preliminary Injunction Motion (ECF No. 28); the Declarations of Larry Rong, Alfred Poor, Paula Whitten-Doolin, and Barry Bordetsky, each dated March 24, 2023, and the Exhibits attached thereto (ECF Nos. 20 to 27); Acuitas Capital's Reply Memorandum of Law in Support of the Preliminary Injunction Motion (ECF No. 30); the Reply Declarations of Michael Wachs and Andrew B. Kratenstein, each dated March 28, 2023, and the exhibits thereto (ECF Nos. 31 to 32); the letter from counsel for Acuitas Capital's to the Court, dated March 30, 2023, and the exhibit attached thereto (ECF No. 34); Ideanomics's response to the letter, dated March 31, 2023, and the exhibit attached thereto (ECF No. 40); and finally the arguments presented by the parties during today's hearing, the hearing held on March 31, 2023.

For the reasons stated on the record of the hearing,

IT IS HEREBY ORDERED that:

1. Acuitas Capital's Preliminary Injunction Motion is granted;

2. Ideanomics shall deliver to Acuitas Capital within one (1) business day of this Order (a) 4,901,960 registered common shares of Ideanomics stock pursuant to Acuitas Capital's Conversion Notice, dated March 3, 2023, and (b) 7,974,481 registered common shares of Ideanomics stock pursuant to Acuitas Capital's Exercise Notice, dated March 6, 2023;

3. Ideanomics shall honor within one (1) business day Acuitas Capital's future conversions of the Preferred Stock and exercises of the Warrants that Acuitas Capital acquired from Ideanomics pursuant to the parties' Securities Purchase Agreement, dated as of November 14, 2022 (the "SPA"), and pursuant to terms of the SPA.

There's a footnote that states that all capitalized terms herein shall have the meaning ascribed to them in the SPA.

4. Through and including May 2, 2023, Ideanomics shall not, without the prior written consent of Acuitas Capital, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, lend, or otherwise transfer or dispose of, directly or indirectly, any shares of capital stock of Ideanomics for any securities

convertible into or exercisable or exchangeable for shares of capital stock of Ideanomics, provided, however, that if the trading price of Ideanomics Common Stock is at least 20% greater than the conversion price of the Preferred Stock, Ideanomics shall have the right to utilize the Standby Equity Purchase Agreement agreed between Ideanomics and YA II PN in August of 2022 to sell up to 3% of the outstanding volume of Ideanomics's common stock.

5. Ideanomics shall comply with all other terms of the SPA, including, without limitation, the SPA's requirement in Section 3(c) that Ideanomics shall have reserved from its duly authorized capital stock not less than the sum of (i) 250% of the maximum number of Conversion Shares issuable upon conversion of the Purchase Shares (without taking into account any limitations on the conversion of the Purchase Shares set forth in the Amended and Restated Articles of Incorporation), and (ii) 250% of the maximum number of Warrant Shares issuable upon exercise of the Warrants (without taking into account any limitations on the exercise of the Warrants set forth therein).

6. Pending further briefing as to the legality of such sale(s), and an ensuing court order, Ideanomics shall hold in escrow, and not dissipate, the proceeds of its sale(s) to YA, of Ideanomics common stock on or after March 7, 2023. Insofar as the parties have sought or may seek additional relief for modification of this Order, the Court directs

counsel to meet and confer forthwith on any such matters, and schedules a hearing for Friday, April 7, 2023, at 11 a.m. in Courtroom 1305 of the Thurgood Marshall United States Courthouse. Any applications for relief are due Tuesday, April 4, 2023, at noon. Any responses are due Wednesday April 5, 2023, at 5 p.m.

7. Acuitas Capital shall not be required to post a bond. However, Acuitas Capital shall hold any proceeds from its future sales of Ideanomics stock obtained pursuant to the SPA in escrow *pendente lite*.

And it's so ordered and signed by me, dated March 31.

Now, just for avoidance of doubt, in the event that there is any transcription error or I misspoke in any way from the bench, it is the text of the written order as opposed to what I said from the bench that shall control.

There was a request about a deadline for an answer. Explain.

MR. BORDETSKY: Your Honor, well, with respect to that, we asked for 30 days. I believe counsel agreed to, with respect to responding, I'll allow him to --

THE COURT: What?

MR. KRATENSTEIN: We consent.

THE COURT: Okay. So you want 30 days?

What would the deadline have been?

MR. BORDETSKY: I think it's next -- the 15th is --

THE COURT: All right. It's late on a Friday. You've got your 30 days. Send me a letter on Monday telling me what that means.

MR. BORDETSKY: Will do.

Two other points, your Honor. And I apologize because I was scribbling: With respect to the April 4th submission, and the April 4, 5 with respect to any disputes with regard to the order, I'm sorry, I don't remember --

THE COURT: Look, here's the point: I don't know who's going to be the movant here and I don't propose to choreograph that. But if one of you intends to move with respect to the lock-up provision, for example, the 48-day request the plaintiff appears to make and the like, the noon, April 4th deadline is the deadline for an affirmative application, and the 5 p.m. on April 5th is the deadline for the response. If I don't get an application from anybody, there's no pending application before me --

MR. BORDETSKY: And it stays on the 2nd?

THE COURT: And it stays on 2nd. Therefore, as to that point, it would appear that the plaintiff would be the first movant, but my imagination has its limits and there may be something you're seeking.

MR. BORDETSKY: Thank you, your Honor.

One other point I had addressed with counsel off the record and asked him for his consent and he consented: If we

could address an issue off the record with the Court at the bench, if we could approach the bench.

THE COURT: Sure. But before we do that, I want to excuse our court reporter. Is there anything further? Is there anything --

MR. BORDETSKY: It may. It may be. This will take a very short time.

THE COURT: Of course.

Before we do that, is there anything further to raise other than what you have in mind at the bench?

MR. BORDETSKY: The one issue that I do have is with respect to the proceeds from the YA sale to the extent that whatever's remaining has to be --

THE COURT: I'm not asking you to reclaim proceeds from somewhere else, that may or may not be a future application, but effective immediately, that stuff is frozen, in effect, as I said.

MR. BORDETSKY: Could we ask the courtesy of the Court to email us a copy of the order so that we can send it, so that could be emailed to the clients directly?

THE COURT: Sure. Happy to do that.

Anything further before we go to the sidebar?

MR. KRATENSTEIN: One other thing, in terms of the application, I know you've set the dates already. Were you contemplating that the applicants would make an order to show

cause or just file a brief? Do you care?

THE COURT: The formalities are less important.

MR. KRATENSTEIN: Okay.

THE COURT: I'm going to treat your application as an order to show cause. Just be crystal clear as to what you're seeking and set out with clarity an order, a proposed order, so that I know specifically what the relief is. That's why I asked you to do that overnight last night, so that there would be no ambiguity about concretely what was being requested.

MR. KRATENSTEIN: Thank you.

THE COURT: See you at the sidebar right now.

Go ahead.

MR. BORDETSKY: I'm looking at the date. That's Erev of Passover on the 5th.

THE COURT: I know. I'm in the same boat, but, look, I mean, get it to me -- if you have to get it to me at 3 p.m. on the first day of Passover or at noon, you'll do that. The reality --

MR. BORDETSKY: If counsel and I agree to a different time, is the Court okay with that?

THE COURT: Yes. The hitch is that if you brief something, I'm going to need some time to dig into it. And, so, if you want to set the dates a little bit earlier on each side, that's fine. But the problem comes if I start getting a reply brief on Thursday.

MR. BORDETSKY: I appreciate that, your Honor. Is there any opportunity to have the briefing the following -- either on -- Wednesday is the second night.

THE COURT: Look, if you agree to a schedule that kicks off the --

MR. BORDETSKY: If we add a week, is the Court okay with that?

THE COURT: Look, why don't you do this: Speak among yourselves, reach out to my chambers on Monday. I'm fully sensitive to what you're talking about.

MR. BORDETSKY: Thank you, your Honor.

THE COURT: If you ultimately want me to find a date the week of April 10, although there are impediments in my schedule, there will be some time.

This is a solvable problem and I certainly don't want to impair anybody's religious observance.

MR. BORDETSKY: I appreciate that.

(Discussion off the record)

(Adjourned)